

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

METLOX MANUFACTURING COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

RESPONDENT.

No. 20,299

On Petition to Set Aside Decision and
Order of the National Labor Relations Board

PETITIONER'S REPLY BRIEF

FILED

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WM. B. LUCK, CLERK

SHEPPARD, MULLIN, RICHTER & HAMPTON

458 SOUTH SPRING STREET
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13 I

14 ALTHOUGH THE BOARD, IN ITS BRIEF, CORRECTLY STATES
15 THE BASIC LAW AND THE BASIC INQUIRY GOVERNING
16 THIS CASE, IT INCORRECTLY APPLIES THAT
17 LAW TO THE INQUIRY.

18 A. As The Board Says, The Law Governing This Case is Simply
19 Stated: When An Employer Claims Financial Inability To
20 Grant Economic Benefits, He Must Stand Ready To Attempt
21 In Good Faith To Substantiate That Claim.

22 At page 12 of its brief, the Board states:

23 "It is well settled that when an employer
24 claims financial inability to grant a demanded
25 wage increase or other economic benefits, he
26 must attempt in good faith to substantiate

1 that claim when he is requested by his employees'
2 bargaining representative. [Citations.] The
3 ultimate inquiry is simply whether, on the facts
4 of the particular case, the employer has met
5 his statutory duty to bargain in good faith."

6 This is an accurate statement of the law in this case.

7 B. As The Board Says, The Question In This Case Is Simply
8 Stated: Was The "Fourth Condition" Imposed By The
9 Company A Lack of Good Faith Bargaining?

10 At page 14 of its brief, the Board states:

11 "In short, the inquiry is whether the Company,
12 by imposing the fourth condition¹, failed to
13 comply with the standards of good faith
14 required by the Act."

15 This is an accurate statement of the inquiry in this
16 case. (See also, Company's Br., p. 10; TXD, p. 9, lines
17 30-34.)

18 C. The Board, Despite Its Correct Statement Of The Law And
19 Of The Inquiry In This Case, Has Fallen Into Error In
20 Its Application Of The Law To The Inquiry.

21

22
23 ¹ The "fourth condition" (actually item 5 in the
24 Company's letter of February 12, 1964) was merely that the
25 C.P.A. who was to have audited the Company's books could not
26 disclose the details of the Company's financial records to
any third parties, including the Union, except to advise the
Union whether the Company's prior representations to the
Union were true. (TXD, p. 6, lines 12-19; p. 9, lines 30-34.)

1 Despite the Board's correct statements in its brief (1)
2 that good faith bargaining merely requires than an employer
3 attempt to substantiate a claim of inability to pay and (2)
4 that the inquiry here is whether the Company met that re-
5 quirement, the entire thrust of the Board's argument here
6 goes far beyond what the Board says the law is and contends
7 that the Company, although attempting to substantiate its
8 claim, did not permit actual substantiation and thus refused
9 to bargain in good faith. This contention is erroneous for
10 three reasons:

11 1. It is clear that the Board, in this case, has de-
12 parted from established law and has held the Company guilty
13 on the theory that the Company did not permit actual substan-
14 tiation, as distinguished from the Company's making a good
15 faith attempt at substantiation. According to the Trial
16 Examiner, as adopted by the Board, (TXD, p. 12, lines 37-40):

17 "I find that Respondent in limiting the
18 : accountant to a 'yes or no' report is not
19 substantiating or permitting substantiation
20 of its inability-to-pay plea, and by this
21 conduct it has not bargained in good faith."

22 2. Not only is this "finding" by the Board in error
23 because it erroneously assumes that actual substantiation is
24 required, but it is error for the Board to characterize it
25 as a "finding"; it is a matter of law, not of fact, whether
26 an employer violates the Act by not permitting the Union to

1 make a general inspection of its books and records. (Yakima
2 Frozen Foods, 130 NLRB No. 128, 47 LRRM 1472, 1473 (1961)
3 affirmed, 316 F. 2d 389 (D.C. Cir. 1963).)

4 As conceded by the Board at page 12 of its brief, the
5 relevant rule of law does not require actual substantiation,
6 but merely a good faith attempt at substantiation. The
7 relevant rule of law, under the Truitt (351 U.S. 149)
8 principle, is that the obligation to furnish substantiating
9 evidence does not "automatically" follow a claim of inability
10 to pay, nor is the employer obligated to substantiate the
11 claim; it is enough if the employer in good faith attempts to
12 substantiate it. (Yakima Frozen Foods, supra, 47 LRRM at
13 pp. 1473-1474.)²

14 3. In any event, regardless of the relevant rule of
15 law, the Company here offered to permit actual substantiation
16 of its inability to pay, and any "finding" or "conclusion" by
17 the Board to the contrary is unsupported by, and is contrary
18 to, the evidence, as shown below.

19 II

20 THE COMPANY OFFERED TO PERMIT ACTUAL SUBSTANTIATION
21 OF ITS INABILITY TO PAY INCREASED ECONOMIC
22 BENEFITS, AND IT IS IRRELEVANT THAT THE DETAILS
23 OF THE COMPANY'S FINANCIAL RECORDS WERE
24 NOT TO BE DISCLOSED TO THE UNION.

25 ² In footnote 6 in the Yakima Frozen Foods case
26 (47 LRRM at p. 1474), the Board specifically repudiated all
statements of principle and law to the contrary.

1 A. The Company Offered To Permit Actual Substantiation Of
2 Its Claim Of Inability To Pay Increased Economic Benefits.

3 In the exchange of correspondence between the Company
4 and the Union, the Union questioned the extent to which the
5 C.P.A. could examine the Company's books. (G.C. 3(e).)
6 Mrs. Selvin (the Company's negotiator) replied by letter
7 that the C.P.A. had carte blanche (G.C. 3(f)):

8 "You have misconstrued my meaning in this
9 case and upon reading it again, I suspect that
10 I may not have made it quite clear. My intention
11 was that your accountant may examine the
12 records, working with our accountant, and
13 your accountant will be allowed to examine
14 the records to the extent he deems necessary
15 to establish the proof of our representations
16 of financial position. I did not intend to
17 limit him to an examination which our accoun-
18 tant believed was necessary." (Emphasis in
19 original letter.)

20 Although the Trial Examiner, as adopted by the Board,
21 quoted a lengthy portion of this letter from Mrs. Selvin in
22 his Decision (TXD, p. 6, line 39 - p. 7, line 45), for some
23 unexplained reason he failed to quote or refer to the crucial
24 portion just quoted hereinabove. This is a critical omission
25 by the Trial Examiner and the Board.

26 Mr. Steres, the C.P.A. chosen by the Union and

1 accepted by the Company to audit the Company's books, was
2 called as an expert witness by the Board. (Board's Br.,
3 pp. 15-16; TXD, p. 10, lines 42-44.) He testified at great
4 length (Tr. pp. 44-138) as to the scope of the examination
5 he deemed necessary, and pursuant to the Company's offer, he
6 had complete carte blanche to investigate everything encom-
7 passed within his testimony. The exhaustive extent of the
8 examination which he would have performed (and to which the
9 Company agreed) is summarized in the Appendix hereto, and
10 not only shows that by agreeing thereto the Company offered
11 to permit actual substantiation of its financial position,
12 but also brings into crystal-clear focus the crucial failure
13 of the Trial Examiner and Board to quote or to refer to that
14 portion of Mrs. Selvin's letter giving the C.P.A. carte
15 blanche "to establish the proof of our representations of
16 financial position."

17 B. In View Of The Carte Blanche Given By The Company To The
18 C.P.A. Chosen By The Union, It Is Irrelevant That The
19 C.P.A. Was Not To Disclose To The Union The Details Of
20 The Company's Financial Records.

21 At pages 17-19 of its brief, the Board argues that
22 the Company's so-called "fourth condition" would have deprived
23 the Union of information "relevant" to the collective bar-
24 gaining. However, this is not so for a variety of reasons:

25 1. The Board in its brief is as vague as the Trial
26 Examiner was in his Decision (and as the Board was in adopting

1 the Trial Examiner's Decision) in pointing out just what
2 information it claims is "relevant" and why it claims it is
3 "relevant". In his Decision, adopted by the Board, the Trial
4 Examiner was unable to say exactly what details of the
5 Company's financial records he thought should be divulged to
6 the Union (TXD, p. 12, lines 40-43):

7 "I cannot with preciseness indicate here the
8 scope that the accountant's report should take.
9 Elaboration or explanation of his conclusions
10 should be permitted; on the other hand, the
11 report need not be an efficiency survey and
12 critique."

13 It its brief, the Board is just as vague. True, the
14 Board says (Board's Br., p. 19) that "As we have seen, the
15 information requested by the Union in the instant case, and
16 which the Company refused to supply, fully satisfied the
17 criterion of relevancy. . . . Accordingly, the additional
18 information sought by the Union was manifestly relevant to
19 the negotiations." However, this assertion by the Board is
20 vague, in that nowhere does the Board spell out what "infor-
21 mation" it has reference to.

22 Initially, the Union requested "substantiating infor-
23 mation and data of the general headings [of the profit and
24 loss statements]" (G.C. 3(a)), later the Union requested
25 "an audit, detailed accounting of the items therein set forth
26 [i.e., in the profit and loss statements] and substantiating

1 information and data" and "a full audit of all the company's
2 financial books and records pertaining to its claimed
3 financial condition" (G.C. 3(e)), and finally the Union
4 requested "the various breakdowns" (G.C. 3(g)).

5 If the Board is now contending that the Union should
6 be given all the information it requested, this, of course,
7 means all the information encompassed by Mr. Steres' testi-
8 mony (see Appendix) and this present contention by the Board
9 in its brief therefor goes far beyond the above quoted
10 contention by the Board in its decision.

11 On the other hand, if the Board in its brief does not
12 intend to go beyond the Board in its decision, then it is
13 uncertain what specific "information" the Board now considers
14 "relevant" to negotiations, and this not only is not spelled
15 out in the Board's brief, but is expressly held to be uncer-
16 tain in the Board's decision.

17 Finally, the only "relevancy" which the Board claims
18 for this unspecified "information" is that, supposedly, it
19 would supply the Union "with substantiation that the figures
20 of profit and loss supplied by the Company, in addition to
21 being accurate, constitute fair representations of the
22 Company's financial condition." (Board's Br., p. 17; see
23 also, Board's Br., p. 19.) However, as shown above, this
24 substantiation would have been supplied in every way by the
25 carte blanche audit by Mr. Steres, and in no way depended
26 upon additional disclosure of the Company's financial records



1 to the Union. Such disclosure, therefore, is irrelevant to
2 the only reason given by the Board in support of its conten-
3 tion of relevancy, and the Board not only does not contend
4 that the information is relevant for any other purpose, but
5 concedes that it is specifically irrelevant insofar as being
6 negotiable is concerned. (Board's Br., pp. 14, 17-18.)³

7 2. The only relevant question was whether the Company,
8 in good faith, had reached its decision that it could not
9 afford to meet the Union's demand and, in good faith, had
10 placed this claim on the bargaining table; it was totally
11 irrelevant whether the Company was right or wrong in its
12 business decision as to what it could, or could not, afford
13 to do. (NLRB v. Jacobs Mfg. Co., 196 F. 2d 680, 684 (2 Cir.
14 1952).)

15 Since the Company already had given its profit and
16 loss statements for 1961, 1962 and 1963 to the Union (TXD,
17 p. 4, lines 15-65) (and the Company offered, but the Union
18 refused, profit and loss statements for the past 10 years
19 (G.C. 2(c), p. 114, lines 1-5; p. 117, line 20 - p. 119,
20 line 5)), the only remaining relevant question was whether
21

22 ³ It should be kept in mind that, although the
23 Company refused generally to permit Mr. Steres to disclose
24 the details of the Company's financial records to the Union,
25 the Company specifically agreed that he could disclose "any
26 specific information pertaining to the employees in the bar-
gaining unit and to that extent we will give your certified
public accountant permission to make such figures available
to the Union which are applicable directly to the bargaining
unit." (TXD, p. 9, lines 11-15; G.C. 3(h).)

1 the P&L's were fair presentations of the Company's financial
2 condition.

3 Mr. Steres, the Certified Public Accountant chosen by
4 the Union and given carte blanche by the Company to perform
5 the audit and also the C.P.A. relied upon by the Board as its
6 expert witness, testified that, following his completion of
7 the exhaustive audit as agreed to by the Company (and as
8 summarized in the Appendix hereto), he would have been able
9 to have told the Union that the Company's profit and loss
10 statements were fair presentations and fairly presented the
11 results of operations, even though he might not have been
12 free to explain to the Union the underlying reasons for his
13 opinion. (Tr. p. 69, lines 18-20; p. 122, line 20 - p. 123,
14 line 6; p. 130, line 24 - p. 131, line 15; p. 132, line 4 -
15 p. 133, line 9; p. 135, line 1 - p. 136, line 23; p. 137,
16 lines 11-19.) Accordingly, since the only relevant question
17 from the Union's standpoint was whether the P&L's previously
18 supplied to the Union were fair presentations, the underlying
19 details were irrelevant insofar as the Union was concerned.

20 3. The Board contends (Board's Br., p. 14) that if,
21 after examining the Company's financial records, Mr. Steres
22 had concluded that the Company's inability-to-pay claim was
23 unjustified because the P&L's did not accurately reflect the
24 Company's financial condition, he would have been prevented
25 from informing the Union of this fact.

26 In the first place, this is not a correct statement

1 by the Board either of the Company's offer or of Mr. Steres'
2 testimony. He testified to the contrary, and said that he
3 could have given a negative opinion (Tr. p. 131, lines 6-15;
4 p. 132, line 4 - p. 133, line 8; p. 135, line 24 - p. 136,
5 line 23), and the Company's offer certainly permitted him to
6 do so (G.C. 3(f)).

7 In the second place, this contention by the Board
8 based upon the speculation that Mr. Steres' audit might have
9 resulted in his conclusion that the P&L's were not fair pre-
10 sentations of the Company's financial position is assuming
11 facts not in evidence; there is no evidence of any kind that
12 the P&L's were anything other than fair presentations in
13 every way. The General Counsel has never contended to the
14 contrary, has introduced no evidence to the contrary, and
15 has not even attempted to prove to the contrary. The P&L's
16 given by the Company to the Union remain unchallenged, and
17 the General Counsel made no effort whatsoever to challenge
18 them, either by subpoenaing the Company's records or other-
19 wise, and it is fair to assume that if the General Counsel
20 seriously contended that the P&L's were erroneous, he at
21 least would have attempted to impeach them.

22 4. As shown by Mr. Steres' testimony (see Appendix
23 hereto), many of the matters he would have audited (and which
24 the Company agreed he had carte blanche to audit) were
25 matters of management discretion; the law is clear that the
26 details of such management discretion are irrelevant to the

1 collective bargaining process (the Board concedes this,
2 Board's Br., pp. 14, 17-18) and hence it is irrelevant that
3 Mr. Steres would have been restricted from divulging such
4 details to the Union.

5 5. As shown by Mr. Steres' testimony (see Appendix
6 hereto), many of the matters he would have audited (and which
7 the Company agreed he had carte blanche to audit) included
8 his obtaining knowledge of the identity of the Company's
9 suppliers and customers; the law is clear that such details
10 are irrelevant to the collective bargaining process (Fruit &
11 Vegetable Packers v. NLRB, 316 F. 2d 389, 390-391 (D.C. Cir.
12 1963); Board's Br., p. 20, footnote 6) and hence it is
13 irrelevant that Mr. Steres would have been restricted from
14 divulging such details to the Union.

15 6. It is almost inconceivable that the Company would
16 have agreed (as it did) to permit a carte blanche audit by
17 Mr. Steres if the profit and loss statements previously given
18 to the Union had been false or misleading; thus, the offer by
19 the Company to permit the carte blanche audit by Mr. Steres
20 was in itself a demonstration that the inability-to-pay claim
21 was made in good faith, and a disclosure of the details of
22 the Company's records to the Union (as distinguished from to
23 Mr. Steres) is wholly irrelevant to this good faith.

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III

CONCLUSION

The only question in this case is whether, under all the circumstances, the Company put forth its inability-to-pay claim in good faith.

Since the Company attempted to substantiate this claim by permitting a carte blanche audit of its books, it is irrelevant that the details of the Company's financial records could not be disclosed to the Union. The Board's contention that such disclosure to the Union should be required is a "straw man", and diverts attention from the key question. The Company's good faith, which is the only question involved, is not measured by whether it was willing (which it was not) to bare its books to the Union, but by whether it was willing (which it was) to bare its books to an independent Certified Public Accountant who had complete freedom to establish the proof of the Company's representations of its financial position.

Under the relevant rule of law, the Company met every obligation of good faith bargaining, and the National Labor Relations Board should be reversed.

DATED: October 10, 1966

Respectfully submitted,

SHEPPARD, MULLIN, RICHTER & HAMPTON

By 

FRANK SIMPSON
Attorneys for Petitioner

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1 5. Comparison by him of discretionary Company
2 expenses for the three years in question with prior
3 years (Tr. p. 68, lines 15-24);

4 6. Evaluation by him as to whether management's
5 judgement was right or wrong in the exercise of dis-
6 cretion as to the handling of bad debts (Tr. p. 68,
7 line 25 - p. 69, line 7; p. 89, line 7 - p. 92, line 7);

8 7. Evaluation by him as to whether management's
9 judgement was right or wrong in the exercise of dis-
10 cretion as to the handling of depreciation (Tr. p. 69,
11 lines 8-11);

12 8. Examination by him of the Company's general
13 ledger (Tr. p. 72, line 22 - p. 75, line 1; p. 76,
14 lines 7-18);

15 9. Inventory by him of material and supplies
16 (Tr. p. 76, lines 22-24);

17 10. Determination by him of the inventory method
18 used by the Company (Tr. p. 77, lines 1-3);

19 11. Determination by him of how the Company accumu-
20 lated the costs that go into inventory (Tr. p. 77,
21 lines 3-4);

22 12. Determination by him of whether the Company
23 used the same inventory method in each year in question
24 (Tr. p. 77, line 4 - p. 79, line 16);

25 13. Evaluation by him of management's judgement as
26 to the useful life of an asset for which depreciation

1 is taken (Tr. p. 81, lines 3-21);

2 14. Evaluation by him of management's judgement as
3 to the choice of depreciation method used (Tr. p. 81,
4 line 22 - p. 82, line 14);

5 15. Examination by him of equipment records to
6 determine the type of equipment the Company had, the
7 original cost, and the life being used in writing off
8 the cost (Tr. p. 82, lines 18-22);

9 16. Examination by him of productive asset
10 accounts, and the related repair and maintenance, so as
11 to evaluate management's judgement in allocating between
12 current expenses and capitalization (Tr. p. 83, line 18-
13 p. 84, line 16; p. 86, line 18 - p. 87, line 20);

14 17. Evaluation by him of management's judgement in
15 expensing or capitalizing research and development
16 costs (Tr. p. 85, line 3 - p. 86, line 6);

17 18. Evaluation by him of management's judgement as
18 to whether new products will be productive assets
19 (Tr. p. 85, line 21 - p. 86, line 12);

20 19. Evaluation by him as to whether there are
21 persons on the payroll getting salaries who perform
22 very minor or no duties (Tr. p. 88, line 1 - p. 89,
23 line 6);

24 20. Determination by him as to whether the Company
25 was delinquent in its payroll taxes (Tr. p. 92, lines
26 12-25);

1 21. Evaluation by him of management's judgement as
2 to advertising expenses and the type of advertising
3 undertaken (Tr. p. 93, lines 1-14);

4 22. Determination by him of the relationship of
5 commissions to salaries and wages, of to whom commissions
6 were paid, and of the services performed therefor
7 (Tr. p. 93, lines 15-22);

8 23. Inquiry by him as to the Company's sources of
9 supply and whether or not these sources were affiliated
10 or otherwise controlled operations (Tr. p. 104, lines
11 16-20);

12 24. Inquiry by him into the contract terms between
13 the Company and its salesmen⁴ (Tr. p. 105, lines 13-16);

14 25. Comparison by him of salesmen's present commis-
15 sions to past commissions (Tr. p. 105, line 22 - p. 106,
16 line 5);

17 26. Correspondence by him with debtors to determine
18 if the amount of accounts receivable were correct
19 (Tr. p. 107, lines 1-3);

20 27. Examination by him of the Company's property
21 tax bills (Tr. p. 107, lines 3-4);

22 28. Inquiry by him as to sales generated by each
23 salesman (Tr. p. 109, lines 13-15);

24
25 ⁴ The Company's salesmen are not part of the
26 collective bargaining unit represented by the Union
(TXD, p. 2, lines 30-35.)

1 29. Inquiry by him into salesmen's expenses
2 (Tr. p. 109, lines 21-25);

3 30. Complete familiarization by him with the
4 Company's financial records (Tr. p. 114, lines 13-19);

5 31. Determination by him as to whether advertising
6 expense was materially greater or lesser than in prior
7 years and, if so, a determination as to the reasons
8 therefor (Tr. p. 115, lines 11-15);

9 32. Inquiry by him into the type of advertising
10 campaign carried on by the Company (Tr. p. 115, lines
11 22-24);

12 33. Evaluation by him of management's judgement as
13 to whether costs of brochures should have been expensed
14 or should have been inventoried and carried forward
15 (Tr. p. 116, lines 3-9);

16 34. Examination by him of (Tr. p. 117, line 20 -
17 p. 121, line 13):

- 18 a. The general ledger;
- 19 b. The cash account;
- 20 c. The accounts receivable account;
- 21 d. The machinery and equipment account;
- 22 e. The sales account;
- 23 f. The expense account;
- 24 g. The cash receipts journal;
- 25 h. The cash disbursements journal;
- 26 i. The check record;

- j. The payroll journal;
- k. The sales journal, showing each sale by customer's name;
- l. The purchases journal, showing vendors;
- m. The general journal;
- n. Cancelled checks;
- o. Vouchers from vendors;
- p. Time cards and timekeeping records;
- q. Sales invoices;
- r. Purchases invoices;
- s. Inventory records;
- t. Shipping documents;
- u. Salary contracts;

35. Ascertainment by him of the Company's suppliers
(Tr. p. 122, lines 16-19)

CERTIFICATE OF SERVICE

I, the undersigned, say that I am and was at all times herein mentioned a citizen of the United States and a resident of the County of Los Angeles, State of California, over the age of 18 years and not a party to the within action; that my business address is 458 South Spring Street, Los Angeles, California 90013; that on 10 October, 1966, I served PETITIONER'S REPLY BRIEF dated October 10, 1966, on the below-named counsel in said action, by depositing true copies thereof, enclosed in sealed envelopes with postage thereon fully prepaid, in a mail-box regularly maintained by the United States Government at 458 South Spring Street, Los Angeles, California, addressed as follows:

General Counsel
National Labor Relations Board
21st Region
849 South Broadway
Los Angeles, California 90014
Attention: George A. Pappy, Esquire

Alfred M. Klein, Esquire
Messrs. Rose, Klein & Marias
315 West Ninth Street
Los Angeles, California 90015
(on behalf of International Brotherhood of
Operative Potters, AFL-CIO)

Plato E. Papps, Esquire
1300 Connecticut Avenue
Washington 6, D. C.
(on behalf of International Brotherhood of
Operative Potters, AFL-CIO)

.....

.....

.....

1 and three copies of the above-named documents to:

2 Marcel Mallet-Prevost, Esquire
3 Assistant General Counsel
4 National Labor Relations Board
5 Washington, D. C. 20570

6 I declare under penalty of perjury that the
7 foregoing is true and correct.

8 Executed on 10 October, 1966 at Los Angeles,
9 California.

10
11 *Carol Ann Parco*
12 _____

13 Carol Ann Parco
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